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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 806

E. P. JACOBS AND AUGUSTUS GUNTER, EXECUTOR OF the Last Will of Mrs. S. B. Gunter, Deceased, petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 163) is reported in 63 F. (2d) 326.

JURISDICTION

The judgment sought to be reviewed was entered February 13, 1933 (R. 163). Petition for certiorari was filed March 27, 1933. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in a suit against the United States under the Tucker Act for the taking of a right of flowage over petitioners' lands resulting from the construction of a dam authorized by Act of Congress, petitioners may recover interest on the amount of damage to their lands from the time of the completion of the dam.

STATUTES INVOLVED

Sec. 177 of the Judicial Code (U.S.C., Title 28, Sec. 284) provides:

> SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest * * *.

The construction of Widow's Bar Dam was authorized by the Rivers and Harbors Act of July 27, 1916, by the following provision (39 Stat. 391, 399):

> * * * for continuing improvement by the construction of locks and dams between Chattanooga, Tennessee, and Browns Island, Alabama, in accordance with the report submitted in House Document Numbered Three hundred and sixty, Sixty-second Congress, second session, as modified by the report of the Board of Engineers for Rivers and Harbors printed in Rivers and Harbors Committee Document Numbered One, Sixty-fourth Congress, first session, $500,000:

> *Provided,* That no contract shall be entered into for the construction thereof until the local interests shall assume and pay all claims for flowage damage or arrange to do so in manner satisfactory to the Secretary of War: *Provided, further,* That one high dam or two low dams may be constructed according as the local interests may contribute the cost of all claims for flowage damage arising from either type of dams, respectively:

The Act of March 2, 1919 (40 Stat. 1275, 1282) contained the following provision:

> Tennessee River, Tennessee, Alabama, and Kentucky: The Secretary of War is hereby authorized to prosecute the work of improvement on the existing project for the section between Chattanooga and Browns Island in accordance with the recommendation in report submitted in Rivers and Harbors Committee Document Numbered 8, Sixty-fifth Congress, third session, that the condition precedent requiring local interests to assume and pay all claims for flowage damages be waived.

STATEMENT

Petitioner Jacobs filed a suit against the United States in the United States District Court for the Northern District of Alabama, alleging that he was the owner of a tract of land situated on Jones Creek, a tributary of the Tennessee River, that part of this land was destroyed and "taken" by

overflow resulting from the construction of Widow's Bar Dam across the Tennessee River, and that damages were sustained in the amount of $10,000.00. (R. 3–10.)—

On the first trial of the case, the District Court rendered judgment for the United States (45 F. (2d) 34, 36). This judgment was reversed by the Circuit Court of Appeals for the Fifth Circuit (45 F. (2d) 34) and the case was remanded to the lower court (R. 23). The case was then consolidated by the District Court with *Gunter, etc.* v. *United States,* and the two cases were tried together (R. 32).

The *Gunter case* involved a suit similar to that in the *Jacobs case,* and related to adjacent lands. The petition alleged that petitioner's decedent was the owner of a tract of land situated on the Tennessee River, that part of this land had been taken and destroyed by overflow, and that damages were sustained to the amount of $9,500.00 (R. 12–19).

On the second trial of these cases, the District Court made findings of fact (R. 36–44), finding that petitioner Jacob's farm suffered damage to the amount of $2,919.00, and that petitioner Gunter's farm was damaged to the amount of $1,030.00 (R. 43–44). Judgment was entered in favor of petitioner for these respective amounts, with interest at six per cent from the date of completion of the dam to the time of payment, together with the costs of the previous appeal, such costs "not

to exceed that allowed by law under Section 152, Judicial Code" (R. 33–36).

This judgment was reversed by the court below in so far as it awarded interest and costs (R. 163). The present petition raises only the question of petitioners' right to interest.

ARGUMENT

Interest may not be allowed in a suit against the United States in the absence of an express agreement or statutory authority for its payment. Section 177 of the Judicial Code; *Boston Sand and Gravel Co.* v. *United States,* 278 U.S. 41; *United States* v. *Commonwealth and Dominion Line, Ltd.,* 278 U.S. 427; *National Volunteer Home* v. *Parrish,* 229 U.S. 494; *United States* v. *Verdier,* 164 U.S. 213; *Angarica* v. *Bayard,* 127 U.S. 251. There is no statute allowing interest involved here, nor was there an express contract providing for interest.

The court below held that this action was based on an implied promise to pay the value of the land taken and that decision was controlled by *United States* v. *North American Co.,* 253 U.S. 330, and that recovery for interest must accordingly be denied. That case has not been overruled, although it has been distinguished in *Seaboard Air Line Ry.* v. *United States,* 261 U.S. 299, and *Phelps* v. *United States,* 274 U.S. 341, and the rule of that case has not been applied in condemnation suits or where land has been taken under statutes providing just

compensation for the taking. The taking involved here was not pursuant to a statute providing for the payment of just compensation. As the *North American Co. case* seems clearly in point and since it has not been overruled, we believe it is unnecessary to discuss the decisions upon which petitioners rely, and we oppose the petition.

CONCLUSION

Since the case seems to be controlled by a decision of this Court, the petition should be denied.

Respectfully submitted.

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